No. 50133-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

PAUL DEREK GOODIN,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 16-1-03762-5
The Honorable Shelly Speir, Judge

OPENING BRIEF OF APPELLANT (CORRECTED)

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2. The "pregnant victim" aggravating factor does not apply to the crime of harassment and must be stricken.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the state failed to establish that the complainant's written statement was voluntary and bore sufficient guarantees of trustworthiness, did the court err by admitting it under ER 801(d)(1)(i)? (Assignment of Error 1)

2. Where the "pregnant victim" aggravator only applies when the crime is a violent offense, but harassment is not a violent offense, should the court strike the jury's special verdict finding that Paul Goodin's harassment conviction is aggravated because he knew the victim was pregnant? (Assignment of Error 2)

III. STATEMENT OF THE CASE

Michelle Gardner and Paul Goodin met and started dating in the summer of 2016. (RP 135-36) According to Gardner, their relationship was happy at first. She was also pregnant with another

man's child, but Goodin was excited about the pregnancy. (RP 146) But things changed toward the end of the summer, and Gardner and Goodin began arguing a lot. (RP 136-37)

On the night of September 20, 2016, Gardner was asleep at Goodin's mother's house. (RP 137-38, 140) She awoke to find Goodin rummaging through her belongings. (RP 139) She asked Goodin what he was doing, and he replied that he was looking for her car keys. (RP 139) Gardner asked why, and Goodin told her he wanted to get his tobacco out of the car. (RP RP 139) Gardner gave Goodin her keys and went back to sleep. (RP 139)

A short time later Gardner heard a noise so she went to the door and looked outside. (RP 139) She saw an unfamiliar car drive away, and did not see Goodin anywhere. (RP 139) Gardner immediately called Goodin and demanded that he bring her car keys back. (RP 139) Goodin returned on foot about two hours later. (RP 140-41)

When he arrived, Gardner demanded her keys and her sweatshirt that Goodin was wearing, and told Goodin that she wanted to end the relationship. (RP 141-42) Goodin returned the keys and the sweatshirt, and Gardner walked out of the front door and towards her car. (RP 142-43) Goodin followed Gardner

outside, and she could see that he had un-holstered his red-handled pocket knife and was holding it so that it was pointing at her. (RP 143-44, 159) She thought that Goodin was planning to cut the car tires with the knife. (RP 144)

According to Gardner, she got into the driver's seat of the car and locked the door. (RP 143, 163) Then Goodin tapped on the passenger side window with the knife, and said, "If you call the police, bitch, I will kill you and your unborn baby." (RP 145, 163) Gardner testified that she was scared and unsure what Goodin was going to do because he looked angry and was not acting like his usual self. (RP 145-49) But she did not think Goodin would actually stab her or the baby because that was not the type of person he was. (RP 146, 148-49, 167)

Gardner drove away and called 911, and Lakewood Police Officer Jordan Feldman responded. (RP 158, 165, 191-92) He contacted Gardner about two blocks away from Goodin's mother's home. (RP 191-92) Gardner was trembling and looked scared, and told Officer Feldman that Goodin threatened her with a knife and said he was going to kill her. (RP 193) Officer Feldman gave Gardner a form on which to write a formal statement. (RP 155-56, 197) On the form, Gardner describes the incident and states, "I

believe he is going to hurt or kill me." (Exh. P1A; RP 148)

After meeting with Gardner, Officer Feldman and six other officers went to Goodin's mother's house to arrest Goodin. (RP 193-94) Goodin did not initially come outside when ordered to do so, but after calling and talking to his mother, Goodin came to the door and was arrested without incident. (RP 194-95) Goodin had a red-handled knife in a holster on his hip. (RP 195) But Goodin told Officer Feldman that Gardner was lying, and that she only called the police to punish him for breaking up with her. (RP 195-96)

The State charged Goodin with one count of second degree assault (RCW 9A.36.021) and one count of felony harassment (RCW 9A.46.020). (CP 1-2) The State also alleged that the crimes were aggravated because it was a domestic violence incident (RCW 10.99.020), Goodin was armed with a deadly weapon (RCW 9.94A.533), and he knew the victim of the offense was pregnant (RCW 9.94A.535(3)(c)). (CP 1-2)

The jury convicted Goodin as charged. (RP 258-59; CP 40-43) The trial court imposed a standard range sentence totaling 90 months of confinement. (CP 413, 416; RP 273) The trial court also imposed only mandatory legal financial obligations. (CP 414; RP 273) Goodin timely filed a Notice of Appeal. (CP 44)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT ERRED BY ADMITTING GARDNER'S WRITTEN STATEMENT AS SUBSTANTIVE EVIDENCE UNDER ER 801(d)(1).

After Gardner testified that she did not think Goodin would kill her or her baby, the State asked her to read the contents of the written form she filled out on the night of the incident. (RP 146-47, 148-49, 149-52) The State also asked to admit the form as an exhibit. (RP 149-52; Exh. P1A) Goodin objected, but the trial court found that the form and its contents were admissible under the "prior inconsistent statement" exception to the hearsay rule. (RP RP 149-52, 199, 202) But the trial court erred because the written statement does not meet the requirements for admission under this exception.

"Hearsay" is an out-of-court statement offered in court to prove the truth of the matter asserted therein. ER 801(c); *State v. Hardy*, 133 Wn.2d 701, 713, 946 P.2d 1175 (1997). Hearsay is inadmissible unless a specific exception applies. ER 802. However, an out-of-court statement is not hearsay if:

> [t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, **or**

other proceeding, or in a deposition[.]

ER 801(d)(1) (emphasis added). The proponent of the statement's admissibility bears the burden of proving these elements. *State v. Nieto*, 119 Wn. App. 157, 160, 79 P.3d 473 (2003). As with other evidentiary rulings, this Court reviews a trial court's admission of evidence under ER 801(d)(1)(i) for abuse of discretion. *State v. Osborn*, 59 Wn. App. 1, 5, 795 P.2d 1174 (1990).

This Court must construe ER 801(d)(1)(i) according to its plain meaning and give effect to all its language. *State v. Sua*, 115 Wn. App. 29, 48, 60 P.3d 1234 (2003). The purpose of the rule and circumstances of each case must be considered to determine whether a statement was produced within the context of an "other proceeding." *Nieto*, 119 Wn. App. at 162.

Reliability is the key factor in determining whether this kind of evidence should be admitted. *State v. Smith*, 97 Wn.2d 856, 861, 651 P.2d 207 (1982). In measuring the reliability of a prior inconsistent statement, courts consider whether (1) the witness made the statement voluntarily; (2) there were minimal guaranties of truthfulness; (3) the statement was part of the standard procedure for determining the existence of probable cause; and (4) the witness was later subject to cross examination. *State v.*

Nelson, 74 Wn. App. 380, 387, 874 P.2d 170 (1994).

Factor (2) was not established in this case because the State failed to show Gardner's written statement contained minimal guaranties of trustworthiness. This phrase has been interpreted as requiring "'an oath and the circumstance of a formalized proceeding[.]'" *Nieto*, 119 Wn. App. at 163 (*quoting Smith*, 97 Wn.2d at 862).

Three cases are instructive here. In *State v. Smith*, the hospitalized declarant, the victim of a severe assault, told a police officer she was afraid and did not know what to do. The officer advised her nothing could be done unless she was willing to testify in court. The declarant later that day came to the police department and learned that by giving a voluntary sworn statement, prosecution against the defendant was likely. After she wrote her statement, a detective took her before a notary and read her the affidavit portion and oath. The declarant reread and signed the affidavit, and the notary subscribed and affixed a seal to the statement. 97 Wn.2d at 858. The Court held, "Minimal guaranties of truthfulness were met since the statement was attested to before a notary, under oath and subject to penalty for perjury." 97 Wn.2d at 862.

Similarly, in *State v. Nelson*, a woman was arrested after she agreed to commit a sexual act on an undercover police detective for money. At the station the woman identified Nelson as her pimp. The detective wrote down the substance of the woman's disclosures as her official statement. Two days later, the woman met with the detective and a prosecutor. 74 Wn. App. at 382-83 fn.1. The woman was then taken before a notary where she signed the affidavit, thereby attesting to the truth of the written statement. 74 Wn. App. at 383 fn.1. The notary witnessed the signature, certified the statement, and affixed a seal. 74 Wn. App. at 383.

Division 1 first rejected Nelson's assertion that without the notary's administration of an oath, the woman's signature on the affidavit lacked formal guaranties of truthfulness. The court found because the form of the affidavit complied with RCW 9A.72.085's requirements for treating an unsworn form as a sworn statement, it constituted a sworn statement for purposes of the oath requirement of ER 801(d)(1)(i).[1] *Nelson*, 74 Wn. App. at 389-90.

[1] RCW 9A.72.085 provides that an unsworn written statement may be treated as a sworn statement if it (1) recites that it is certified or declared by the person to be true under penalty of perjury; (2) is signed by the person; (3) states the date and place of its execution; and (4) states that it is so certified or declared under the laws of the state of Washington. Gardner's statement contained a form that also complied with RCW 9A.72.085. (Exh. P1A)

More problematic for the *Nelson* court was whether the record established that the woman knew her statement was being taken under penalty of perjury. 74 Wn. App. at 390. The woman was equivocal at trial as to whether she read the affidavit. However, the prosecutor had reviewed the statement with the woman and explained the significance of the affidavit when she originally signed it. In addition, the notary testified that it was her standard practice to ask a witness whether she read the affidavit and would not execute it if given a negative response. For these reasons, the court held the woman's signature on the affidavit satisfied the required minimal guarantees of trustworthiness. *Nelson*, 74 Wn. App. at 390.

Finally, *State v. Nieto* involved admission of a statement handwritten and signed by a witness during a police station interview. 119 Wn. App. at 159-60. In the statement, the witness described her sexual relationship with Nieto and disclosed they had "consensual" intercourse several times before she turned 16. 119 Wn. App. at 160.

Nieto argued the police interview did not qualify as an "other proceeding" under ER 801(d)(1)(i). *Nieto*, 119 Wn. App. at 162. Division 1 agreed, finding that, unlike in *Smith* and *Nelson*, "no

notary was present here, nor were any other formal procedures involved." *Nieto*, 119 Wn. App. at 163.

Further, the witness testified she did not read the "penalty of perjury" language contained in the boilerplate, pre-printed statement form and that the language had no meaning for her. Nor did the officer remember reading the language to the witness. *Nieto*, 119 Wn. App. at 163. And unlike in *Nelson*, the State did not establish that the prosecutor reviewed the statement with the witness or explained the importance of the perjury language, or that the notary regularly asked a witness whether she read the language and executed the document only upon an affirmative answer. *Nieto*, 119 Wn. App. at 163-64.

Goodin's case is analogous to *Nieto* and easily distinguishable from *Smith* and *Nelson*. First, the State failed to demonstrate Gardner knew her statement and signature were given under penalty of perjury. On direct examination, the prosecutor asked Gardner to read the certification language, including the "penalty of perjury" provision that appeared on page one of the written statement form. (CP 154; Exh. P1A) Gardner acknowledged that she voluntarily wrote, signed and dated the form. (RP 155)

On cross-examination, however, Gardner testified that Officer Feldman gave her the form and told her to fill it out without explanation, and that he did not draw her attention to the certification language or tell her the statement was being made under penalty of perjury. (RP 155-56) Officer Feldman left her alone as she completed the form, then he pulled his patrol car alongside her car and retrieved the form before driving away. (RP 155-56) She testified that she did not understand that her statement was written under penalty of perjury. (RP 155)

Officer Feldman testified that he left Gardner alone to complete the form. When she returned it to him, he looked it over and confirmed that Gardner had nothing to add. (RP 197, 209-10) Although he testified that he generally makes the writer aware of the certification language, he did not testify that he specifically drew Gardner's attention to the language, nor did he explain that she was signing the form under penalty of perjury. (RP 197-98) And unlike in *Smith* and *Nelson*, the form was not reviewed and signed in front of a notary.

There is no indication Gardner read the certification language at the time she wrote and signed her statement. In addition, Gardner's testimony indicated she was not aware of the

significance of the language. For all these reasons, the State failed to prove the statement's reliability for use as substantive evidence under ER 801(d)(1)(i). The trial court abused its discretion by admitting the written statement under this rule.

The error is not harmless. To convict Goodin of assault as charged and instructed in this case (CP 1, 21, 22, 26), the State had to prove that Goodin assaulted Gardner with a deadly weapon and thereby put Gardner "in apprehension of harm." RCW 9A.36.021(1)(c); *State v. Elmi,* 166 Wn.2d 209, 215, 207 P.3d 439 (2009). To convict Goodin of harassment as charged and instructed (CP 2, 27, 30), the State had to prove that Goodin threatened to kill Gardner and that Gardner was placed "in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(b), .020(2)(b).

At trial, Gardner testified that she was scared but, though she did not know what Goodin was going to do, she did not think that Goodin would actually stab her, kill her, or kill her unborn baby. (RP 146-47, 167) In her written statement, on the other hand, Gardner says that she believes Goodin is going to kill her and her unborn baby. (RP 147-48; Exh. P1A) Therefore, the written statement was the only evidence presented that could have

established that Gardner was placed "in apprehension of harm" or feared that Goodin would carry out his threat to kill her. Without the written statement, the State could not prove the elements of the crimes. The admission of the written statement is not harmless, and Goodin's convictions must be reversed.

B. THE "PREGNANT VICTIM" AGGRAVATING FACTOR IS NOT LEGALLY APPLICABLE TO THE CRIME OF HARASSMENT.[2]

Sentences must fall within the proper presumptive sentencing ranges set by the legislature. *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). However, a court may impose a sentence that exceeds the sentence range if a jury finds, beyond a reasonable doubt, one or more aggravating factors alleged by the State, and if the court determines that "the facts found are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6); *State v. Hyder*, 159 Wn. App. 234, 259-60, 244 P.3d 454 (2011).

An exceptional sentence must be both legally and factually justified. *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). The appellate court should review the legal applicability of a statutory aggravating factor de novo. *State v. Stubbs*, 170 Wn.2d

117, 123-24, 240 P.3d 143 (2010); *Law*, 154 Wn.2d at 93-94.

The State alleged, and the jury found, that Goodin's harassment conviction was aggravated because he knew the victim was pregnant. (CP 2, 37, 43) This aggravating factor is listed in RCW 9.94A.535(3)(c), which allows for a sentence above the standard range if "[t]he current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant." By its plain terms, this aggravator only applies when the current offense is a violent offense.

RCW 9.94A.030(55) lists crimes that are considered violent offenses. The crime of harassment is not included in this list. Any crime that is a class A felony is also considered a violent offense. RCW 9.94A.030(55)(a)(i). Felony Harassment that is a threat to kill, as alleged in this case, is only a class C felony. RCW 9A.46.020(2)(b). Therefore, this aggravating factor is not legally applicable to the crime of harassment and that verdict should be stricken.

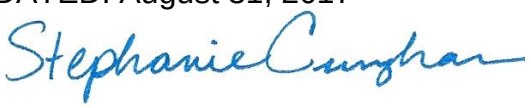
V. CONCLUSION

The trial court erred by admitting Gardner's written statement

[2] The trial court did not impose an exceptional sentence. However, Goodin is challenging the jury's special verdict in the event that he is ever retried or resentenced on the harassment charge.

as substantive evidence under ER 801(d)(1)(i). Goodin is therefore entitled to reversal of his convictions and remand for a new trial. And the jury's special verdict finding that Goodin's harassment conviction is aggravated should be stricken because the pregnant victim factor does not apply to the crime of harassment.

DATED: August 31, 2017



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CERTIFICATE OF MAILING

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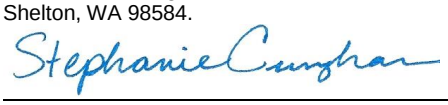

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